Filed 4/19/13 Loo v. Klingbeil Management CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NANCY LOO, Plaintiff and Appellant, v. KLINGBEIL CAPITAL MANAGEMENT, LTD., Defendant and Respondent.	G047050 (Super. Ct. No. 30-2012-00540483) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jane D. Myers, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed. Request for judicial notice. Granted.

Henry J. Josefsberg for Plaintiff and Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker and Martin K. Deniston for Defendant and Respondent.

* * *

INTRODUCTION

Plaintiff Nancy Loo was employed by defendant Klingbeil Capital Management, Ltd. (Klingbeil), as the property manager of an apartment complex that was managed by Klingbeil and owned by KMF Merrimac Woods, LLC (KMF). After Loo's employment with Klingbeil was terminated, Loo filed a complaint with the California Labor Commissioner, alleging various wage and hour claims against Klingbeil. In September 2009, KMF filed an unlawful detainer action against Loo for failure to pay rent. (*KMF Merrimac Woods, LLC v. Loo* (Super. Ct. Orange County, No. 30-2009-00299377 (the KMF action).) Loo filed a cross-complaint in the KMF action, asserting claims against Klingbeil and KMF for wrongful employment termination and wrongful eviction.

After the Labor Commissioner issued an order, decision, or award, denying Loo any recovery (the Labor Commissioner's decision), Loo sought to appeal that decision by filing a motion for leave to amend her cross-complaint in the KMF action, to add a claim appealing the Labor Commissioner's decision and requesting a trial de novo; the trial court denied her motion to amend.

Loo thereafter filed a State of California Department of Industrial Relations, Division of Labor Standards Enforcement form 537 notice of appeal (DLSE form 537) in the superior court, and thus commenced the instant action. The trial court dismissed the instant action on the ground Loo's appeal from the Labor Commissioner's decision was untimely under Labor Code section 98.2, subdivision (a) (section 98.2(a)), and awarded Klingbeil prevailing party attorney fees and costs. (All further statutory references are to the Labor Code unless otherwise specified.)

We reverse. The sole issue before us is whether the trial court erred by dismissing the instant action as untimely under section 98.2(a). We conclude Loo's appeal was timely because, two months before filing that appeal, she had sufficiently

requested appellate review of the Labor Commissioner's decision and requested a trial de novo in a pending case within the timeframe required under section 98.2(a).

PROCEDURAL BACKGROUND

I.

LOO FILES CLAIM WITH LABOR COMMISSIONER'S OFFICE AGAINST KLINGBEIL, AND KMF FILES THE KMF ACTION.

In August 2009, Loo filed a complaint with the Labor Commissioner's office, alleging Klingbeil failed to pay her overtime pay, commissions, expenses, and certain wages, and also failed to provide her required meal periods. In September, KMF filed its action.

II.

LOO FILES CROSS-COMPLAINT AGAINST KLINGBEIL AND KMF IN THE KMF ACTION.

In July 2011, Loo filed a cross-complaint in the KMF action, in which she alleged claims for wrongful employment termination, wrongful eviction, discriminatory eviction, and breach of her residential lease agreement; all the claims were alleged against both KMF and Klingbeil.

In her cross-complaint, Loo alleged she had worked for Klingbeil as an apartment manager from September 2007 until July 2009. She alleged that she worked long hours, was required to be on call "24/7," and had complained to Klingbeil about expense reimbursements, hours of work, overtime pay, and not receiving proper meal and rest breaks. In June 2009, Loo alleged, she had emergency surgery for appendicitis. She claimed Klingbeil denied her request for medical leave. Loo asserted that within days, "however, KLINGBEIL's Regional Manager asked that [Loo] come in for some 'paperwork,' which she did. The Regional Manager then terminated [Loo's] employment, asserting flimsy reasons." Loo further alleged that she remained in residence at the apartment complex for an unspecified amount of time before she was

served with a three-day notice "for non-payment of rent." Either KMF or Klingbeil commenced formal eviction proceedings against Loo; during those proceedings, she vacated her residence. In the cross-complaint, Loo sought, inter alia, wage and related losses, emotional distress damages, and punitive damages.

III.

THE LABOR COMMISSIONER'S DECISION

The proceeding before the Labor Commissioner (that Loo had commenced in August 2009) concluded on October 31, 2011.[1] On November 29, 2011, the Labor Commissioner's decision was issued, denying Loo any recovery on her claims. The Labor Commissioner's decision was served by mail.

IV.

LOO FILES MOTION FOR LEAVE TO AMEND HER CROSS-COMPLAINT IN THE KMF ACTION, TO ADD CLAIM APPEALING FROM THE LABOR COMMISSIONER'S DECISION.

On December 13, 2011, Loo filed a motion for leave to file an "amended and supplemental Cross-Complaint" in the KMF action, which would include, inter alia, an appeal from the Labor Commissioner's decision under section 98.2. On the first page of the notice of motion for leave to amend, Loo stated: "TO ALL INTERESTED PARTIES AND ATTORNEYS OF RECORD: [¶] PLEASE TAKE NOTICE that Defendant NANCY LOO will and hereby does move, pursuant to California Code of Civil Procedure Code Sections 473 and 464 *and Labor Code Section 98.2* to file a First amended-Supplemental Cross-Complaint" (the proposed amended cross-complaint). (Italics added.) On the second page of the notice, Loo stated in part: "This Motion is based on the grounds that this is the first opportunity to file an amended or supplemental

[1] Our record does not explain why it took two years to litigate Loo's claims before the Labor Commissioner.

cross-complaint adding an appeal re wage claims from and related to an administrative hearing conducted by the California Division of Labor Standards Enforcement, entitled Loo v. Klingbeil Capital management, Ltd., State Case No. 19-77912 BB, in which an Order, Decision or Award of the Labor Commissioner issued on November 29, 2011. [¶] Plaintiff seeks to have a trial *de novo* as to the Award pursuant to California Labor Code Section 98.2, which is done by filing an appeal for such relief in this Court. [¶] In addition, related wage claims and unfair competition causes of action are properly raised by this Amended Cross-Complaint because they are alleged against an existing party Defendant, KLINGBEIL, and relate to the same facts as were originally alleged."

In the memorandum of points and authorities, filed in support of her motion, Loo stated that she had informally requested that KMF and Klingbeil stipulate to Loo filing the proposed amended cross-complaint, but she did not receive a response from them. In addition to a claim appealing the Labor Commissioner's decision and requesting a trial de novo, the proposed amended cross-complaint also included a claim for unpaid overtime compensation.

V.

THE TRIAL COURT DENIES LOO'S MOTION FOR LEAVE TO FILE THE PROPOSED AMENDED CROSS-COMPLAINT IN THE KMF ACTION; LOO UNSUCCESSFULLY PETITIONS THIS COURT FOR A WRIT OF MANDATE.

On January 19, 2012, the trial court denied Loo's motion to file the proposed amended cross-complaint in the KMF action. Following a hearing on the motion, the court's tentative ruling became the final ruling, which stated in part: "This ruling does not affect [Loo]'s ability to file a separate petition with the court to appeal the Labor Commission award, and both sides can address the notice issues in that proceeding." The court gave the following reasons for its decision: "This is a procedurally peculiar case as it poses the issue of whether cross-complainant Loo is

permitted to mix a wage claim with unlawful detainer?[2] It is not. . . . [¶] . . . For purposes of computing the 10-day period after service, Section 1013 of the Code of Civil Procedure is applicable. [¶] There is a form notice of appeal (DLSE 537) for [Loo] to use. The form requests that the court clerk specially set a hearing date for a trial de novo on the Labor Commission award. While the above section does not specify a particular format for notice of appeal. [*Sic.*] It is not by noticing and filing this motion. Putting aside whether this notice was timely. [*Sic.*] A trial de novo is an entirely separate matter and the reason to hear an appeal de novo is to insure that the hearing is specific to appealing the 'order, decision, or Award' relating to wages. Otherwise, allowing [Loo] to file 'one' motion would in effect defeat the formal process mandated by the Labor Code by improperly allowing the adjudicating of unlawful detainer issues of which Labor Commission has no jurisdiction with wage claims which are exclusive to the Labor Commission."

Loo filed a petition for writ of mandate in this court, in which she sought relief from the trial court's order denying her motion for leave to amend her cross-complaint. This court summarily denied Loo's petition on the ground she had an adequate remedy at law.

VI.

LOO FILES DLSE FORM 537 AND INITIATES THE INSTANT ACTION.

On January 25, 2012, Loo initiated the instant action in the trial court by filing DLSE form 537, which is entitled "Notice of Appeal," and, as completed by Loo, stated she (1) appealed the Labor Commissioner's decision, a copy of which was attached

---

[2] According to the cross-complaint, Loo had vacated her residence at the apartment complex by July 28, 2010—about six months before the trial court's minute order denying the motion for leave to amend the cross-complaint; neither KMF nor Klingbeil contend otherwise. Thus, the trial court's reference to the case as an "unlawful detainer" action appears to be in error.

to the DLSE form 537; (2) requested the court clerk to set and serve notice of a de novo hearing before the superior court under section 98.2; and (3) certified that a copy of the DLSE form 537 that she filed had been served on the Labor Commissioner and Klingbeil.

On January 26, 2012, Loo filed a notice of related case in the KMF action.

VII.

THE TRIAL COURT GRANTS KLINGBEIL'S MOTION TO DISMISS THE INSTANT ACTION AS UNTIMELY AND AWARDS KLINGBEIL PREVAILING PARTY ATTORNEY FEES.

Klingbeil moved to dismiss the instant action on the ground it was not timely filed. The trial court granted the motion and ordered the instant action dismissed. The court's minute order stated:

" . . . The appeal filed 1-26-12 is dismissed. The court declines to rule on [Loo]'s request, made in the opposition to the motion to dismiss, that this case be consolidated with [the KMF action]. Such a request should be made by noticed motion.

"Labor Code § 98.2(a) sets forth the time for appealing the decision of the Labor Commissioner and it requires that an appeal be filed within 10 days after service of the decision, with an additional 5 days added if service is by mail. If an appeal is not timely filed, the decision of the Commissioner becomes final. [Citation.] The deadline for filing the appeal is jurisdictional and the court has no discretion to excuse a late filing on grounds of mistake, inadvertence, surprise, or excusable neglect.

"'The time for filing a notice of appeal from a decision of the Labor Commissioner is mandatory and jurisdictional. A late filing may not be excused on the grounds of mistake, inadvertence or excusable neglect.' [Citation.]

"It is clear [Loo] did not file a separate 'appeal' within the 15 day time frame (which expired on 12-14-11). The Notice of Appeal which opened this case was not filed until 1-26-12, well past the deadline. [Loo] did, however, file a Motion for Leave to File Amended-Supplemental Cross-Complaint in [the KMF action]—which

sought to add a 5th cause of action for 'trial de novo.' The Notice of Motion stated that [Loo] wanted to add 'an appeal re wage claims from and related to an administrative hearing conducted by the California Division of Labor Standards Enforcement.'

"The 5th cause of action stated that [Loo] was 'dissatisfied' with the decision of the Labor Commissioner and sought a trial de novo under Labor Code §98.2.

"There is no little doubt [Loo] intended the cross-complaint she sought to file in the other case to serve as her appeal of the decision of the Labor Commissioner. However, the motion for leave to file the amended cross-complaint was denied and the cross-complaint itself was never filed. [Loo] thus asks this court to deem the appeal in this matter timely filed as of the date the motion for leave to file the amended cross-complaint was filed in the other case. [Loo] points out that the prior motion was filed within the time to appeal and that courts liberally construe a notice of appeal so as to protect the right to appeal where it is reasonably clear what the appellant was trying to appeal from and the other side was not prejudiced. [Citation.]

"[Klingbeil] points out that [Loo] did not pay the filing fee for an appeal when she filed the motion in the other case and that the proof of service attached to the motion did not show service on the Labor Commissioner. [Klingbeil]'s points about the filing fee and service on the DLSE are not persuasive. Case law is clear that the failure to submit the correct fee at the time of filing an appeal is not grounds to refuse to file the appeal. [Citation.] As to the lack of service on the DLSE, that would also not serve to defeat an otherwise timely appeal as the purpose appears to be to alert the DLSE not to seek judgment on the award.

"However, while the relatively minor service and payment issues with the filing of the motion to amend the cross-complaint in the other case do not, by themselves, establish no appeal was timely filed, the simple fact is that [Loo] did not timely file an 'appeal.' While [Loo] is correct the courts construe notices of appeal liberally, there still needs to be an actual appeal to liberally construe. Here, [Loo] filed a motion for leave to

amend a cross-complaint. That is not an appeal, whatever the cause of action [Loo] asked to have added to the cross-complaint. The request that this court construe a motion for leave to amend, filed in a completely different case, which was denied, as the notice of appeal in this case, would not be a liberal construction of a notice of appeal but the creation of an appeal where none was actually filed.

"The Labor Commissioner Appeal set for April 16, 2012 at 9:00 am in Department C 3 is vacated."

The trial court thereafter granted Klingbeil's motion for prevailing party attorney fees under section 98.2, subdivision (c), and awarded Klingbeil $11,422.32 in attorney fees.

VIII.

LOO APPEALS.

On June 11, 2012, Loo filed a notice of appeal "from the Judgment in this matter and all related appealable orders." Judgment in favor of Klingbeil, in the total amount of $11,852.32 for attorney fees and costs, was not entered until July. Although Loo's notice of appeal was premature, we use our discretion to treat the notice as filed immediately after entry of the judgment. (Cal. Rules of Court, rule 8.104(d)(2); *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 36.) Pursuant to KMF, Klingbeil, and Loo's stipulation, the trial court ordered a stay of the KMF action until the conclusion of Loo's appeal in the instant action.

REQUEST FOR JUDICIAL NOTICE

Loo filed a motion to augment the appellate record with two documents filed in this court, in support of her writ petition challenging the trial court's order that denied the motion for leave to file the proposed amended cross-complaint in the KMF action. As explained in our order, we deem Loo's motion as a request for judicial notice of those documents filed in a separate case. Pursuant to Evidence Code sections 459 and

452, subdivision (d), which authorize this court to judicially notice records of any court of the State of California, Loo's request is granted.

DISCUSSION

I.

GENERAL LEGAL PRINCIPLES GOVERNING SECTION 98.2 APPEALS

Section 98.2(a) provides: "Within 10 days after service of notice of an order, decision, or award the parties may seek review *by filing an appeal to the superior court*, where the appeal shall be heard de novo. The court shall charge the first paper filing fee under Section 70611 of the Government Code to the party seeking review. The fee shall be distributed as provided in Section 68085.3 of the Government Code. A copy of the appeal request shall be served upon the Labor Commissioner by the appellant. For purposes of computing the 10-day period after service, Section 1013 of the Code of Civil Procedure is applicable." (Italics added.)

The California Supreme Court has applied "the rules governing conventional appeals to appeals in which a trial de novo it required." (*Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 836.) The Supreme Court has held, "'[t]he time for filing a notice of appeal from a decision of the Labor Commissioner is mandatory and jurisdictional. A late filing may not be excused on the grounds of mistake, inadvertence or excusable neglect. This conclusion is in harmony with the Legislature's purpose in providing an administrative forum for the resolution of wage disputes. [¶] The policy underlying this process is sound for it ensures the expedition of the collection of wages which are due but unpaid. [Citation.] Public policy has long favored the "full and prompt payment of wages due an employee." [Citation.] . . . Requiring strict adherence to the time requirement governing appeals from decisions of the Labor Commissioner can only help to assure the achievement of this overriding goal.'" (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 376.)

"'The timely filing of a notice of appeal forestalls the commissioner's decision, terminates his or her jurisdiction, and vests jurisdiction to conduct a hearing de novo in the appropriate court. [Citation.]' [Citation.] 'Although denoted an "appeal," unlike a conventional appeal in a civil action, hearing under the Labor Code is de novo. [Citation.] "'A hearing *de novo* [under Labor Code section 98.2] literally means a new hearing,' that is, a new trial." [Citation.] The decision of the commissioner is "entitled to no weight whatsoever, and the proceedings are truly 'a trial anew in the fullest sense.'"'" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1116, fn. omitted.) "An employee need not administratively exhaust his claim before filing a civil action." (*Id.* at p. 1117.)

II.

NO SPECIFIC FORM IS REQUIRED TO INITIATE AN APPEAL UNDER SECTION 98.2.

Neither section 98.2 nor any other statute or rule prescribes the proper form an appeal filed under section 98.2 should assume. A leading treatise in employment law explains: "The Labor Code, Code of Civil Procedure, and California Rules of Court provide no guidance regarding the nature of the pleading, notice, or other document necessary to initiate an 'appeal' under [section 98.2(a)]. In practice, the procedures vary from court to court. Some courts may require filing of a formal civil complaint, others may accept a copy of the complaint before the Labor Commissioner, while others may require a 'notice of appeal' accompanied by a copy of the Labor Commissioner's decision (and possibly a brief)." (1 Wilcox, Cal. Employment Law (2012) Remedies, § 5.18[2][a], p. 5-48 (rel. 43-5/2011).) The treatise further explains: "The Labor Commissioner has promulgated a form of Notice of Appeal (DLSE 537), which it suggests using in appealing a decision of the Commissioner under Labor Code Section 98.2(a). . . . The form is modeled after the notice of appeal used in conventional civil appeals. . . . However, counsel should check with the particular court in which the appeal is to be filed before using this form because the rules of that court will govern the

format of the papers to be filed, and some courts may not accept the DLSE form or may require additional supporting papers." (*Id.* at pp. 5-48 to 5-49, fns. omitted.)

The parties have not cited any Orange County Superior Court policy regarding the format of section 98.2 appeals, and we have found none.

California courts have held that an appeal from a determination of the Labor Commissioner may be filed in a pending civil case in superior court. For example, in *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1098, the appellate court rejected the argument that an appeal from the Labor Commissioner's determination under section 1700.44, subdivision (a) must be instituted as a separate proceeding in the superior court. The appellate court explained: "We see nothing wrong with filing the notice of appeal and request for trial de novo in a pending action between the parties when the pending action includes the same issues adjudicated by the Commissioner." (*Yoo v. Robi*, *supra*, at p. 1099.) The court noted that "when the issues in the proceedings before the Labor Commissioner and in the pending superior court action are the same, requiring a separate, independent action be filed in order to effectuate an appeal from the Labor Commissioner's determination generally would not benefit either party but only result in additional costs, delay and more paperwork for the court staff." (*Ibid.*; see *Murphy v. Kenneth Code Productions, Inc.*, *supra*, 40 Cal.4th at p. 1118 [holding an employee may raise "additional wage-related claims at the de novo trial" following appeal from Labor Commissioner's decision under section 98.2].)

In light of the California Supreme Court's application of rules governing conventional appeals under section 98.2, we note that in conventional appeals, "[t]he notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a)(2).)

Furthermore, an appellant's failure to initially comply with certain appellate procedures does not invalidate the appeal itself (although failure to cure any such failure might result in the appeal being dismissed). For example, "[t]he clerk must file the notice

of appeal even if the appellant does not present the filing fee, the deposit, or an application for, or order granting, a waiver of fees and costs." (Cal. Rules of Court, rule 8.100(b)(3).) An appellant's failure to serve the notice of appeal "neither prevents its filing nor affects its validity, but the appellant may be required to remedy the failure." (*Id.*, rule 8.100(a)(3).) In addition, "it is and has been the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59; *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 22 ["'[t]he law aspires to respect substance over formalism and nomenclature'"].) A document that does not express a party's intent to appeal, however, will not be construed as a notice of appeal. (See *In re Issac J.* (1992) 4 Cal.App.4th 525, 535; *In re Christopher A.* (1991) 226 Cal.App.3d 1154, 1161 [appellate court concluded a party's letter, which was "clear and intelligible" and timely filed, constituted a valid appeal].)

III.

LOO'S MOTION FOR LEAVE TO FILE THE PROPOSED AMENDED CROSS-COMPLAINT CONSTITUTED AN APPEAL UNDER SECTION 98.2.

It is undisputed Loo had until December 13, 2011 to timely file her appeal from the Labor Commissioner's decision in superior court. It is evident that were we to consider Loo's January 25, 2012 filing of the DLSE form 537, and concomitant commencement of the instant action, standing alone, we would conclude Loo failed to timely appeal the Labor Commissioner's decision. The key question, therefore, is whether Loo's filing of her motion for leave to file the proposed amended cross-complaint in the KMF action, which was filed December 13, 2011 (and served by mail on Klingbeil on December 10), satisfied the "filing an appeal" requirement of section 98.2, and the subsequent filing of the instant action, constituted Loo's ongoing pursuit of that appeal.

In light of the absence of a *required* form to initiate a section 98.2 appeal combined with the well-established policy that notices of appeal must be liberally construed, the filing of Loo's motion for leave to file the proposed amended cross-complaint did timely satisfy that requirement for the following reasons. Loo's motion was filed in the right place (superior court) within the statutory timeframe. It also unambiguously expressed Loo's intent to appeal the Labor Commissioner's decision, stating in part: "Plaintiff seeks to have a trial *de novo* as to the Award pursuant to California Labor Code Section 98.2, which is done by filing an appeal for such relief in this Court." In the first paragraph of her memorandum of points and authorities, filed in support of the motion, Loo unambiguously stated that "[t]he DLSE issued an award on November 29, 2011, about which LOO is dissatisfied and, therefore, appeals, seeking a trial *de novo*. Accordingly she wishes to amend and supplement her Cross-Complaint to add the trial *de novo* and related claims against KLINGBEIL."

It is of no moment that the motion for leave to file the proposed amended cross-complaint was ultimately denied and the proposed amended cross-complaint was never filed; Loo's act of filing the motion in and of itself, containing the above quoted language, satisfied the requirement that she file an appeal from the Labor Commissioner's decision under section 98.2. (Whether the trial court abused its discretion in ruling on the motion for leave to file the proposed amended cross-complaint is not before us because the KMF action is not before us.)

At the trial court's direction, Loo filed a DLSE form 537 and initiated the instant action. We hold that the date Loo "fil[ed] an appeal," within the meaning of section 98.2(a), relates back to the date she filed her motion for leave to file the proposed amended cross-complaint in the KMF action. Thus, the trial court erred by granting Klingbeil's motion to dismiss the instant action as untimely, and by subsequently awarding Klingbeil prevailing party attorney fees. By filing the instant action, Loo

continued to pursue her section 98.2 appeal and satisfied other procedural requirements (serving the Labor Commissioner, submitting required fees, etc.) in doing so.

DISPOSITION

The judgment (including the grant of Klingbeil's motion for attorney fees) is reversed. Appellant shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.